Supreme Court of the United States.

The City of Covington, Kentucky, and John N. Meddendorf, Assessor of the City of Covington,
Appellants
vs.
The First National Bank of Covington,
Appellee
and
The First National Bank of Covington, Kentucky,
Appellant
vs.
The City of Covington and John N. Meddendorf, Assessor of the City of Covington, Kentucky,
Appellees.

Nos. 113-114.

BRIEF FOR THE CITY OF COVINGTON.

Statement of the Case.

There are about one hundred National banks in Kentucky, and ninety-five of this number are paying State and local taxes on their shares of stock under an "Act relating to the taxation of the shares of stock of National banks," approved on the 21st of March, 1900 (which may be found on pages 53-54 of this Record). But the First National Bank of Covington seeks, in this action, to enjoin the City of Covington from the collection of any taxes under said act, upon two grounds (stated at length in the petition):

First. Because of an alleged contract, under the Hewitt law, existing only by reason of an estoppel by *res judicata*.

Second. Because it is claimed said act of March 21, 1900, is repugnant to Section 5219, Revised Statutes of United States, and therefore void.

A general demurrer to the petition, as amended, was presented by the city.

The case having been heard, the court below (Hon. Walter Evans then being Judge thereof), granted and perpetuated the injunction prayed for as to taxes for any time prior to March 21, 1900 (date of adoption of said act), but refused the injunction as to taxes for any time subsequent to said date. The judgment of the court below, therefore, in effect, overruled the plea of estoppel by reason of the said adjudication in 1895, and sustained the said act of March 21, 1900, except as to the retrospective feature thereof. To that judgment the appellants excepted and prayed an appeal to this court, which was dismissed; and the case is again here practically on the same questions. The sufficiency of the alleged estoppel, by former adjudication, and the validity of the said act of 1900, being the only questions arising on these appeals.

Specification of Errors.

The court erred in permitting the decree entered pursuant to the opinion of Judge Evans, on the 17th day of December, 1900, to stand as entered (page 65 of the Record).

Brief of Argument.

IS THE ACT IN CONTROVERSY UNCONSTITUTIONAL BECAUSE ITS RETROACTIVE PROVISION IS REPUGNANT TO SECTION 5219, REVISED STATUTES OF UNITED STATES?

We need not remind this Honorable Court "that every possible presumption is in favor of the validity of a statute; and this continues until the contrary is shown beyond a rational doubt."

(*Sinking Fund cases*, 99 U. S., 700).
(*Powell vs. Pennsylvania*, 127 U. S., 684).

First, let us look at the origin and purpose of this act of 1900. In 1892, the Kentucky Legislature adopted an act, entitled "An act relating to revenue and taxation," Article three (3) of which related to the assessment and taxation of corporate franchises. (See Acts, 1891-'92-'93, page 277, which is incorporated in Kentucky Statutes as Chapter 108).

This said act of 1892, by its express terms, applies to both State and National banks.

In 1899, in *Owensboro Nat. Bank vs. City of Owensboro*, 173 U. S., this court held that said Article three (3), relating to the taxation of corporate franchises, was void in so far as it proposed the taxation of the franchises of National banks.

At the next succeeding Legislature thereafter, on March 21, 1900, the Kentucky Legislature, in view of said decision by this court, adopted the act now in controversy, in order to conform its revenue laws to the said decision.

The *ad valorem* levies, State and local, were imposed each year since 1892. Same have been paid by State banks and other taxpayers generally. National banks and the shareholders therein have received their share of the benefits of said levies.

The retroactive feature of said act is not inhibited by either the State or Federal Constitution. It does not impair the obligation of any contract. It does not take private property for public use without just compensation previously rendered. It only requires the owners of National bank shares to pay a just compensation for the bene-

fits they have received under and in consequence of said ad valorem levies. It only provides a remedy for correction of a wrong and enforcement of a right. When the ad valorem levies of each year were imposed, the right of the State and localities to taxes thereunder upon National bank shares arose. As lately declared by Kentucky Court of Appeals: "When the tax levy is made, the liability (for taxes) accrues. For such liability a lien existed on his property (*Board of Councilmen vs. Mason & Ford Co.*, 100 Ky., 48; Blackwell on Tax Titles, 5th Ed. (1889), Sections 324 and 327; Kentucky Statutes, Sections 3176 and 3375).

The Hewitt law having been repealed prior to 1893, and the Revenue Act of 1892 being void, in so far as it proposed taxation of the franchises and property of National banks, the shares in National banks were left, in 1893, subject to taxation for State and local purposes, under the Constitution and revenue laws of Kentucky, precisely as if neither said Hewitt law nor act of 1892 had ever been enacted. (Constitution, Kentucky, Sections 170, 171, 172 and 174; Kentucky Statutes, Sections 4020, 4022, and the charters of first, second, third, fourth, fifth and sixth class cities, incorporated in Kentucky Statutes; *Scobee, Sheriff, vs. Bean, &c.*, 22 Ky. Law Rep., 1076).

Section 171, Kentucky Constitution provides: "They (taxes) shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax." These constitutional and statutory provisions fix the situs of all National bank shares for purposes of taxation "where the bank is located, and not elsewhere." Otherwise, taxation of same could not be uniform nor equal. The Constitution of Kentucky does not contemplate that some of the shares in a National bank may be taxed where the bank is located, and other shares in the same bank taxed elsewhere. Such would conflict with the principle of uniformity and equality in taxation expressly

incorporated in the present Constitution of Kentucky. (*Maltby vs. R. & Col. Ry. Co.*, 52 Pa. St., 140, and authorities there cited).

It will be noted the value of real estate of this bank is deducted from the assessed value of the shares—(Record, page 80).

Retroactive legislation is discussed with much force and clearness in *Butler vs. City of Toledo*, 5 Ohio State, 225, and we invite the special attention of this Honorable Court to the authorities there collated.

"Retrospective laws which violate no principle of natural justice, but are in furtherance of equity and good morals, are not forbidden by the Constitution" (*Marion County vs. L. & N. R. R. Co.*, 91 Ky., 388, and authorities there cited; *Mattingly vs. Dist. of Col.*, 97 U. S., 687; *L. & N. R. R. Co. vs. Commonwealth*, 1 Bush Ky. R., 250; Cooley's Con. Lim., 5th Ed., pp. 455 to 471). In order to secure uniformity of taxation, the Revenue Statutes of nearly all the States expressly authorize retrospective assessments.

The Court of Appeals of Kentucky, in the case of *Town of London vs. Hope et al.*, reported in 26th Kentucky Law Reporter, page 112 (decided May 13, 1904), held that the provisions of the act of March 21, 1900, which provides "for the assessing of shares of stock in National banks, retrospectively," was a valid exercise of the legislative power. For the convenience of the court, we quote briefly from the opinion in said case:

> "Section 3 of this statute contains the express provision that when any shares of stock have not been listed for taxation for State, county or municipal purposes, under levy or levies, for any year or years since 1892, it shall be the duty of the president and cashier to list the same for taxation, under levy or levies for the years omitted. We do not see how the legislative intent to assess the shares of stock retrospectively

could have been made plainer than by the language employed in Section 3 of this act. Nor is the provision of the act invalid for the reason that it thus seeks to retrospectively tax the shares of National banks for the years which they have escaped taxation.

"Cooley, in his work on Taxation, 2d Edition, page 291, says: 'The basis of an apportionment of taxes may as lawfully be retrospective as the reverse; that is to say, it may as well have regard to benefits theretofore received as to those which may be received thereafter. It has, therefore, been very properly held that there is no constitutional or other legal objection to the levy of taxes to pay for municipal improvements which had been previously made. Nor in apportioning the tax as between individuals is there any valid objection to making it on consideration of a state of things that may now have come to an end; as where a tax is imposed on the extent of one's business for the preceding year, instead of upon an estimate of the business of the year to come. Where taxes are levied for a series of years upon the same valuation of property, they are necessarily retrospective, but not, therefore, incompetent, though one may be taxed upon property which he long ceased to own when the tax is levied. But there is commonly a presumption that any new tax law was not intended to reach back and take for its standard of apportionment a state of things that may no longer be in existence. "New burdens," it is very justly said, "ought always to be prospective," and it is reasonable to suppose the Legislature has intended that they should be. Such a supposition is in harmony with the general rule of law which requires the courts to "always construe statutes as prospective, and not retrospective, unless constrained to the contrary course by the rigor of the phraseology." This is the rule not only as a construction of the grant of power, but also as to all the incidents; though a remedial provision may well be presumed to have been intended to reach back for the purpose of justice.'"

But if there could be a shadow of doubt as to the validity of this act of 1900 on account of its retroactive feature, a recent decision of this Honorable Court must remove all such doubt. This is a case of *Florida Cen. & Pen. R. R. Co. vs. Reynolds*, 183 U. S., 471. (For convenience we copy the syllabus of Justice Brewer's opinion).

> "There is nothing in the Federal Constitution which forbids a State to reach backward and collect taxes from certain kinds of property which were not at the time collected, through lack of statutory provision therefor, or in consequence of a *misunderstanding as to the law*, or from neglect of administrative officials, without also making provision for collecting the taxes for the same years on other property."

Now, in view of *Mercantile Nat. Bank vs. New York* (121 U. S., 138), and other cases of like import, the Legislature of Kentucky of 1892 thought that National banks could be lawfully taxed as provided in Article 3, Chapter 108, Kentucky Statutes, and continued under that impression until the decision of this Honorable Court in case of *Owensboro National Bank vs. Owensboro* (173 U. S.).

Therefore this "misunderstanding of the law" fully authorized the retroactive section of the act of 1900.

Besides, it must be remembered the Kentucky Court of Appeals expressly decided that the shares of stock in National banks in Kentucky were subject to taxation for local purposes under the general revenue law for the years 1892 to 1900 (*Scobee, Sheriff, vs. Bean*, 22 Ky. L. R., 1076), and this is only a *curative statute*.

In *City of Chester vs. Black* (Pa., 6 L. R. A., 802), it was held that where local improvements were made by a city under legislative authority subsequently declared unconstitutional, it was competent for the Legislature to pass an act authorizing a reassessment to meet the cost of such improvement.

In *Mills vs. Charleston*, 29 Wisconsin, 400, it was held a tax void for want of proper legislation to justify it may be reassessed after proper legislative action.

(See also *Re Van Antwerp*, 56 New York, 261, and Desty on Taxation, 647).

The Legislature may pass an act directing a reassessment, although the prior act directing the assessment was declared invalid.

Long vs. Kiende, 27 Hun., 66.

Where an exercise of taxing power fails from any cause and a tax is reassessed, it is a debt due upon the reassessment as from the time when it should have been first assessed.

Plummer vs. Marathon Co., 46 Wis., 184.

Where taxation proves abortive, either by failure of the law under which it is made, or by the nonfeasance or misfeasance of officers, a reassessment under the general law for such cases, or by special legislative enactment gives the taxpayers no reasonable ground for complaint. (Cooley on Taxation, 309).

In order to create some apprehension that injustice may be done the owners of the shares of National banks by retroactive assessments, counsel for the bank may ask the question:

> "Suppose some of the shares of this bank had been transferred to a *bona fide* purchaser during some of the years when no assessment of the stock had been made, or during the years prior to 1900, for which we are now endeavoring to collect taxes on same, could this purchaser be now required to pay taxes on the stock so purchased?"

We answer: *If there was no law authorizing* the assessment of such shares, and no lien existing thereon, then

a *bona fide* purchaser would have taken it *free from any liability* for the taxes for such years (*Florida Central & Pen. R. R. vs. Reynolds*, 183 U. S., 471), and the bank (having a record of owners of shares) could protect itself and the shareholders by *showing the facts.*

But we insist that no such equity can be asserted, as to the shares of this bank, (a) because the situs of taxation was in Kentucky, at the place where the bank was located, by the express provision of Section 5219, U. S. Statutes; and (b) because the shares were liable to taxation and subject to assessment under the revenue laws of Kentucky during the years from 1893 to 1900, as expressly decided by our Court of Appeals in *Scobee, Sheriff, vs. Bean*, 22 Ky. L. R., 1076, and, therefore, under the Constitution and laws of Kentucky there was a valid and *subsisting lien on each of said shares for city taxes for each year from* 1893 *to* 1900.

His Honor, Judge Evans, in his opinion herein, says:

> "At all events, for the reasons indicated, it seems to the court to be very clear that Section 3 of the act (of 1900) conflicts with the requirements of Section 5219 (U. S. Statutes), because there is nowhere any corresponding retroactive imposition on State bank shares; and the rate of taxation on real estate can hardly be the equivalent of the rate of taxation imposed on State banks by the franchise act" (Record, page 57).

But we beg leave to call your Honor's attention to the fact that, under the statute law of the State of Kentucky, the *rate of taxation* is the *same on real estate as upon personal* property and choses in action; and, in Kentucky, statutory provision is made for the retrospective assessment of *all property.*

> (Kentucky Statutes, Sections 4090-4241).
> (*Lou. & Jeff. Ferry Co. vs. Com.*, 22 Ky. L. R., 446).

Moreover, the supposed dangers contained in the retroactive Section (3) of the act of 1900, making it possible to reach back indefinitely in assessing shares of National banks (which seemed to haunt the mind of His Honor, Judge Evans), are now entirely removed and destroyed by the fact that under the present revenue laws of the State of Kentucky (as recently construed by our Court of Appeals) *five years' limitation prevents the retrospective assessment of the shares of National banks beyond five years from the time the assessment should have been made.*

Discrimination.

IS THE ACT IN CONTROVERSY UNCONSTITUTIONAL BY REASON OF ANY CONFLICT WITH SECTION 5219, REVISED STATUTES OF THE UNITED STATES?

"The plain intention of that statute was to protect the corporations formed under its authority from unfriendly discrimination by the States in the exercise of their taxing power."

(*Adams vs. Nashville*, 95 U. S, 22).

"The principle we are discussing has its limitation, a limitation growing out of the necessity on which the principle itself is founded. That limitation is, that the agencies of the Federal Government are only exempted from State legislation so far as the legislation may interfere with or impair efficiency in performing the functions by which they are designed to serve that government. Any other rule would convert a principle founded alone in the necessity of securing to the Government of the United States the means of exercising its legitimate powers into an unauthorized and unjustifiable invasion of the rights of the States."

(9 Wallace, U. S. S. Ct., 362).

"It has never been held by this court that the State should abandon systems of taxation of their own banks, or of money in the hands of their other corporations, which they may think the most wise and efficient modes of taxing their own corporate organizations, in order to make that taxation conform to the system of taxing the National banks upon the shares of their stock in the hands of their owners.

"All that has been held necessary is, that the system of State taxation of its own citizens, of its own banks and of its own corporations, shall not work a discrimination unfavorable to the holders of the shares of National banks. Nor does the Act of Congress require anything more than this; neither its language nor its purpose can be construed to go any farther. Within these limits the *manner of assessing and collecting* all taxes, by the States, is uncontrolled by the Act of Congress."

(*Davenport Nat. Bank vs. Davenport Board of Equalization*, 123 U. S., 83).

The liberal construction of Section 5219, Revised Statutes, U. S., so clearly announced in the foregoing extracts, has been adhered to by this Honorable Court in an *unbroken line of decisions;* and we only ask that the same liberal construction be applied to this just revenue statute of the State of Kentucky (act of March 21, 1900).

Van Slyke vs. Wisconsin, 154 U. S., 581.
First Nat. Bank vs. Ayres, 160 U. S., 660.
Aberdeen Bank vs. Chihalis Co., 166 U. S., 440.
Merchants Bank vs. Penn., 167 U. S., 461.
Lander vs. Mercantile Bank, 186 U. S., 458.
Mercantile National Bank vs. New York, 121 U. S., 138.

It will be kept in mind that the restriction placed by Section 5219, Revised Statutes U. S., upon taxation of National bank shares by State authority is, "that the taxation shall not be at a greater rate than is assessed upon other monied capital *in the hands of individual citizens.*"

Congress, being aware that every State is always careful to guard the interests of her individual citizens, very properly selected the taxation of "individual citizens" as the standard by which to test the validity of taxation imposed by State authority upon National bank shares, knowing that, so long as that restriction be not violated, there could be no danger of any substantial discrimination against National bank shares (in the taxation thereof by State authority).

Did the mode of assessment of "monied capital in the hands of individual citizens" invested in State banks and institutions of loan or discount (in Keutncky from 1892 to 1900) discriminate against National bank shares? If it did, it also discriminated against "monied capital in the hands of individual citizens" *not thus invested,* and against all real estate and tangible property belonging to citizens of Kentucky.

Why would the Legislature of Kentucky discriminate in favor of "monied capital in the hands of individual citizens" that is invested in State banks and institutions of loan or discount against "monied capital in the hands of individual citizens" not so invested, and against all heal estate and all tangible personal property belonging to citizens of Kentucky?

The proposition that Article 3, Chapter 108, Kentucky Statutes, discriminated in favor of the property embraced thereby, has never been advanced. On the contrary, the evident purpose thereof was to prevent monied capital invested in corporations from escaping any part of the burden of taxation. Said article is well adapted to its purpose, and its practical operation has proven its efficiency in securing the assessment and just taxation of all forms of corporate property, including corporate franchises.

By said article, all tangible property of the corporation is left to be assessed and taxed as that of natural

persons, and the nominal "franchise" is made to include all intangible property of the corporation as well as its franchise proper. The value of the "franchise" (including all intangible property) is ascertained by first estimating the total value of the capital stock, and then deducting therefrom the assessed value of the tangible property. The mode of assessment insures the assessment and taxation of not only the "franchises" proper, but also the tangible and intangible property of the corporation, including all money, checks, notes, bonds, stocks, bills of exchange, accounts and choses in action.

In *Owensboro National Bank vs. City of Owensboro,* 173 U. S., 662-664, the bank vigorously contended that said article (Article 3, Chapter 108, Ky. Statutes), imposed a greater burden of taxation upon monied capital invested in all the banks than was imposed by laws of Kentucky upon "other monied capital in the hands of individual citizens," and was for that reason in conflict with both Section 5219, Revised Statutes, and the State Constitution. Now, herein the complainant bank's contention is directly the reverse. In that case the Supreme Court did not decide whether or not said contention was well founded in either particular, but placed its decision upon the ground that the State could not tax the franchises or property of National banks at *any rate.*

If said contention on part of the bank in that case was well founded, the complainant's contention herein is unfounded; because if said article then imposed a greater burden of taxation upon the property of corporations embraced thereby than was imposed by the laws of Kentucky upon the property of individual citizens, a less burden is imposed by the act of 1900 upon National bank shares than is imposed upon State banks.

If said Article 3 discriminated, substantially, either in favor of or against the individual citizen, the same would be in conflict with the State Constitution, and *pro*

tanto void. But the Kentucky Court of Appeals has held that there is no such discrimination in said article, and that the same is constitutional, in so far as the principle of equality in taxation is concerned (*Paducah Street Ry. Co. vs. The County of McCracken*, 20 Ky. Law Rep., 1294).

There being no discrimination by said article in favor of the property embraced thereby or against other property, it follows that the same did not discriminate against National bank shares, they being taxed as other property generally. Hence, the shares of stock in National banks in Kentucky were not taxed at "a greater rate" than "is assessed upon other monied capital in the hands of individual citizens." There was, therefore, no conflict between the revenue laws of Kentucky, as amended by the act in controversy, and Section 5219, Revised Statutes, U. S.

The Court of Appeals of Kentucky, after full consideration, has recently decided that the act of March 21, 1900, *did not discriminate against* the shares in National banks, and was not in conflict with Section 5219, Revised Statutes, U. S.

Commonwealth vs. Citizens Nat. Bank of Danville, and *Scobie, Sheriff, vs. Bean*, 22 R., 1079.

Citizens Nat. Bank of Lebanon vs. Commonwealth. (Decided April 27, 1904, and to be reported in Vol. 25 Ky. L. R., 2254).

In the last named cases the banks contended that the act of March 21, 1900, was repugnant to Section 5219, U. S. Statutes, because it permits an illegal discrimination against stock in National banks as compared with other monied capital in the hands of individual citizens, because National banks are of necessity owners of U. S. bonds exempted from all taxation (and no provision is

made in this act for the deduction of these bonds from assessed value of the shares).

This contention has long since been fully settled by this Honorable Court. We quote the head notes of two important decisions on this subject.

"A State possesses the power to authorize the

This argument that the Act of 1900, in question, discriminates against National Banks because it does not allow deductions for U. S. bonds. is based upon the mistaken assumption that State Banks in Kentucky are still taxed, under the former Statute on their franchises—which, as construed, is practically a tax on their property—and therefore State Banks owning U. S. bonds would be entitled to deduct them from their assessments when no such right is allowed National Banks under said Act of 1900.

But counsel, in this contention, wholly overlook the amendment to the former Revenue Statute providing that, in cities of the first, second and third classes in Kentucky State Banks shall be taxed on their shares—same as the shares of National Banks—(See Act of March 23d 1900, page 89, Session Acts, still in force) and therefore, neither State nor National Banks in Kentucky are entitled to any deductions of U. S. bonds owned by the bank, and hence there is no discrimination whatever.

Thus it will be seen that the act in controversy makes no discrimination *in law;* and it is not contended here there will be any discrimination *in fact;* and if there was any discrimination in fact under the operation of said statute, of course, the bank can and will be protected by pleading and proof against any such discrimination.

made in this act for the deduction of these bonds from assessed value of the shares).

This contention has long since been fully settled by this Honorable Court. We quote the head notes of two important decisions on this subject.

> "A State possesses the power to authorize the taxation of the shares of National banks in the hands of stockholders whose capital is wholly invested in stock and bonds of the United States under the Act of Congress of June 3, 1864. * * * The tax on the shares is not a tax on the capital of the bank, but upon a distinct, independent interest or property held by the shareholder."
>
> *Hammond vs. Commonwealth of Massachusetts, &c.*, and *Churchill vs. City of Utica* (bank tax cases), decided March 26, 1866 (Vol. 70, U. S.).

> "Tax on shares of a shareholder in a National bank is not illegal, because the tax commissioners, in the valuation of the shares, refused to deduct the amount of the capital of the bank invested in U. S. securities."
>
> *People vs. Commissioners,* decided January 7, 1867 (Vol. 71, U. S.).

As a matter of fact, however, the State banks in Kentucky do not own any U. S. bonds, because they are unprofitable as an investment.

> See also *First Nat. Bank vs. Ayres,* 160 U. S., 660.

Thus it will be seen that the act in controversy makes no discrimination *in law;* and it is not contended here there will be any discrimination *in fact;* and if there was any discrimination in fact under the operation of said statute, of course, the bank can and will be protected by pleading and proof against any such discrimination.

It would seem that the purpose of the bank is not so much to avoid a *discrimination* against its shares, as to avoid, by litigation and delays, the *payment of any taxes whatever.*

III.

The Alleged Contract of Exemption.

THE ESTOPPEL PROPOSED BY APPELLEE SHOULD NOT PREVAIL IN THIS COURT, BECAUSE THE SAME WOULD NOT PREVAIL IN THE COURTS OF KENTUCKY.

Remember, it is *now conceded* there never was any contract of exemption under the Hewitt Law, but it is claimed the contract was established by a judgment of the State court. Therefore, the only question is the effect of the State court judgment.

We are aware that a contract of immunity from taxes, although established only by a judgment relating to certain years' taxes, has been fully upheld as to other years' taxes by this Honorable Court (*New Orleans vs. Citizens Bank*, 167 U. S., 371), yet that was in a State (Louisiana) where the laws and usages as to the effect of the judgment were the same as in this Honorable Court, and the attention of the court was not specially directed to this question.

What effect as an estoppel should be given the judgment relied on by appellee herein?

In the case of *Mills vs. Duryee*, 7 Cranch, 484, this court, having under consideration the question above propounded, after discussing the constitutional provision and act of Congress on the subject, Justice Story delivering the opinion, said:

> "It remains only, then, to inquire in every case what is the effect of a judgment in the State where it

is rendered, * * * and we can perceive no rational interpretation of the act of Congress, unless it declares a judgment conclusive when a court of the particular State where it is rendered would pronounce the same decision."

In the case of *Hampton vs. McConnell*, 3 Wheaton, 234, this court, Chief-Justice Marshall delivering opinion of the court, said:

> "This is precisely the same case as that of *Mills vs. Duryee*. The court can not distinguish the two cases. The doctrine there held was, that the judgment of a State court should have the same credit, validity and effect in every other court in the United States which it had in the State where it was pronounced, and that whatever pleas would be good to a suit thereon in such State, and none others, could be pleaded in any other court in the United States."

To the same effect is *McElmoyle vs. Cohen*, 13 Peters, 326; *Christmas vs. Russell*, 5 Wallace, 290; *Thompson vs. Whitman*, 18 Wallace, 457; *Phoenix Ins. Co. vs. Tennessee*, 161 U. S., 184; *Metcalfe vs. Watertown*, 123 U. S., 671; *Cooper vs. Newell*, 173 U. S., 555.

Besides, the same being a non-federal question, in which only citizens of Kentucky are concerned, this court will, for that reason alone, follow the State court decisions on that subject (*Phoenix Ins. Co. vs. Tennessee*, 161 U. S., 184; *Abraham vs. Casey*, 179 U. S., 218).

In a case which was decided in the Eighth Circuit, the learned judge rendering the decision, said:

> "The general rule is that the laws of the several States shall be regarded as rules of decision in the courts of the United States in cases to which they apply. The judiciary act requires this, and it would be the law independently of that enactment. Under this rule the first question which confronts the Federal Appellate Court is, What is the local law applicable to the case?

"The local law which forms the rule of decision may consist of a statute or of the decisions of its Supreme Court, or both," etc., etc.

Bergman vs. Bly, 66 Fed. Rep., 43.

"The inquiry is what is the settled law of the State at the time the decision is made? This constitutes the rule of property within the State by which the rights of the litigant parties must be determined As the Federal courts profess to be governed by this rule, they can never act inconsistently by enforcing it."

Lavin vs. Emigrant Sav. Bank, 1 Fed. R., 650.
Shelby vs. Gay, 11 Wheaton, 367.
Green vs. Neal's Lessees, 6 Pet., 299.

"The exposition given by the highest tribunal of the State," said Justice Shiras in a case involving the contention that a State statute impaired the obligation of a contract, "must be taken as correct, so far as contracts made under the act are concerned."

Morley vs. Lake Shore Ry. Co., 146 U. S., 166.

"It is a well-settled principle that the decisions of the State courts in the construction of a State constitution and laws are to be adopted by the Federal courts. This doctrine is established by numerous decisions."

Insurance Co. vs. Iron Co., 42 Fed. R., 376.

Further decisions upon this subject are as follows:

R. R. Co. vs. Blossburg et al., 20 Wallace, 137-143.
Bank vs. Bank, 136 U. S., 235.
Lawton vs. Young, 52 Fed. Rep., 439.
Sanford vs. Roe, 69 Fed. Rep., 546.
Bauserman vs. Blunt, 147 U. S., 647.
Thompson vs. Sawyer Co., 57 Fed. Rep., 1030.
Bergman vs. Bly, 66 Fed. Rep., 40.

Luther vs. Borden, 7 How., 1.
Lavin vs. Sav. Bank, 1 Fed. Rep., 641.
Christy vs. Pidgeon, 4 Wall., 196.
Leffingwell vs. Warren, 2 Black, 603.
R. R. vs. Trust Co., 82 Fed Rep., 124.
Hill vs. Hite, 85 Fed. Rep., 268.
R. R. Co. vs. Reed, 80 Fed. Rep., 234.
Rice vs. Adler, 71 Fed. Rep., 151.
Hodgson vs. Burleigh, 4 Fed. Rep., 121.
Durden vs. Malloy, 43 Fed. Rep., 407.
R. R. Co. vs. Guest, 84 Fed. Rep., 628.
Southerland vs. Village of Ernst, 86 Fed Rep., 597.

The Federal courts have repeatedly affirmed this doctrine, that on local questions they would follow the latest decisions of the State court, even though they overturned former decisions, *where no contract rights had been entered into upon the strength of the former adjudication.* And here permit us to direct attention to the fact that no contract rights whatever involved in this case have been entered into upon the strength of the alleged adjudication of 1895, for the charter involved here was accepted by the bank long before such decision, and could not possibly have been entered into upon any supposed rights fixed by that decision. It was not as if this decision had been read into its charter. The annulling of that decision did not violate any contract right obtained on account thereof.

> "The construction given to a statute of a State by the highest tribunal of such State is regarded as a part of the statute, and is as binding upon the courts of the United States as the text. *If the highest tribunal of the State adopt new views as to the proper construction of such statute and reverse its former decisions, this court will follow the latest settled adjudications.*"

Bauserman vs. Blunt, 147 U. S., 654.

"It is well settled that these courts, in construing the statute laws of the several States, will follow the latest decisions of the court of last resort in the particular State whose statute is before the court for construction."

Thomas vs. Burney, 35 Fed. Rep., 115.

Under the Kentucky doctrine, there is no such thing as *res adjudicata* in tax cases, except for the particular taxes involved. This works no greater hardship upon the litigant than the rule limiting the judgment estoppel to the specific thing involved in matters other than taxes. The question is rather one of *stare decisis* than *res adjudicata,* and it has been said that "there is no vested right to claim the benefit of any particular decision of a court."

Talliaferro vs. Barnett, 47 Ark., 359.

We have, therefore, only to ascertain the effect as an estoppel given to such judgments, as that relied on by appellee herein, "by the courts, laws and usage of Kentucky. Would the same be a good plea of estoppel in the courts of Kentucky?

In the case of *City of Newport, &c., vs. Commonwealth,* 21 Ky. L R., 47 (decided April 26, 1899), the Kentucky Court of Appeals said:

"The only question remaining for decision is upon the plea of *res judicata.* The plea in this case avers that the subject-matter of the former suit was identical with that involved in this action, and that the facts were the same in both actions, except that the former action attempted to collect a tax for the year 1893, and the present action was attempting to collect a tax for the year 1894. * * *

"The authorities seem to hold that when a court of competent jurisdiction has, upon a proper issue, decided that a contract, out of which several distinct promises to pay money arose, has been adjudged invalid in a suit upon one of those promises, the judg-

ment is an estoppel to a suit upon another promise founded on the same contract. But taxes do not arise out of contract. They are imposed in *invitum*. The taxpayer does not agree to pay, but is forced to pay, and *the right to litigate the legality of a tax* UPON ALL GROUNDS *must of necessity exist, regardless of former adjudications as to the validity of a different tax.* * * *

"The decision of the Circuit Court as to the taxes for 1893 is not binding upon this court as to the taxes for subsequent years.

"It follows, therefore, that the judgment must be affirmed.

"The whole court sitting."

It matters not, therefore, *upon what ground* the exemption is claimed in a former suit—whether that of contract, or that the property is used for governmental purposes, or that it is exempted by statute, or that the exemption claimed is a vested or constitutional right—whatever the ground of exemption relied on and litigated in the former suit as to one year's taxes, the adjudication (according to the foregoing decision) is not conclusive as to the same matters of fact or law in a subsequent litigation between the same parties as to any other year's taxes.

The above doctrine, announced by the Kentucky Court of Appeals in 1899, in the foregoing case, has been uniformly adhered to by that court ever since, and has been reasserted by the same court in numerous cases between the date of said decision and the present time.

The next Kentucky case involving the same question was that of the *Louisville Bridge Co. vs. The City of Louisville*, 22 Ky. L. R., 703 (decided October 17, 1900), in which the Court of Appeals said:

> "In response to appellant's plea of *res judicata*, it may be said that this identical question was before the court in the case of *Henderson Bridge Co. vs. The City of Henderson*, decided June 24, 1896, and in the

very recent case of *Newport vs. Masonic Temple Co.*, 20 Ky. L. Rep., 266, and the *City of Newport vs. Commonwealth*, 21 Ky. L. Rep., 42. It was held that a judgment as to the validity of taxes for one year is not conclusive as to the validity of taxes on the same property for another year; and as the question is fully considered in these cases, it is unnecessary to elaborate it again."

On the same subject, in the case of *Negley, Sheriff, vs. City of Henderson*, 59 S. W., 19 (decided November 21, 1900), a Kentucky case, the Court of Appeals said:

> "This brings us to consider the question of *res judicata*. It was, in *City of Newport vs. Commonwealth, supra*, distinctly and emphatically held that an adjudication as to the tax of one year did not create the estoppel of *res judicata* against the same tax for another year."

The next case to same effect in Kentucky was that of *Bell County Coke & Improvement Co. vs. The City of Pineville*, 23 Ky. L. Rep., 933 (decided October 4, 1901). The substance of the decision is stated in the syllabus as follows:

> "A judgment enjoining the collection of a tax for one year does not prevent the collection of a tax for another year."

The opinion, after stating the case and coming to the plea of *res judicata*, said:

> "The case of the *City of Newport, &c., vs. Commonwealth*, 21 Ky. L. R., 42, is decisive of the question raised by the plea of *res judicata*."

The case of the *Board of Councilmen of the City of Frankfort vs. Deposit Bank of Frankfort*, 23 Ky. Law Rep., 1285 (decided on November 19, 1901), involved the same question. Exemption was claimed by the bank on

the ground of a former adjudication of contract in a litigation as to taxes for the years 1895, '6, '7 and '8. The court, holding the plea fo estoppel to be unavailable, said:

> "It is not necessary for the court to hold, and it does not (the question not being before it), that the bank is responsible for the taxes for the years involved in the Federal court proceeding. However, we do hold that the judgment of the Federal court is not a bar to a recovery of the taxes for the years 1893 and 1894.
>
> "This court, in *City of Newport vs. Commonwealth*, 21 Ky. Law Rep., 42; *Louisville Bridge Co. vs. City of Louisville*, 22 Ky. Lrw Rep., 703, held that an adjudication as to one year's taxes is not a bar to a recovery in the litigation as to any other year's taxes."

The last named case was followed on December 19, 1901, by the case of *Lou. Bridge Co. vs. City of Louisville*, 65 S. W. R., 814. The plea of estoppel by *res judicata* was interposed as a ground of exemption. But the Court of Appeals (Ky.) said:

> "The plea of *res judicata* relied on for reversal has been decided so frequently adversely to the contention here made in recent decisions of this court that it is unnecessary for us to consider this question: It having been expressly decided that a judgment by a court of competent jurisdiction in a suit for taxes for one year did not constitute a bar in a subsequent suit between the same parties under the same law for another year's taxes" (the court here citing with approval the Kentucky cases on that subject above referred to in this brief).

There can be no doube, therefore, what effect as an estoppel the Kentucky Court of Appeals would give the judgment relied on herein by the appellee as an estoppel if this case wree pending in that court.

Viewed in the light of the Kentucky decisions alone, the same is not an estoppel in this case.

Hence, under the now well-established principle first announced in *Mills vs. Duryee*, 7 Cranch, and adhered to by this court ever since, the plea of estoppel by appellee is not available herein.

His Honor, Judge Cochran, concurs with the foregoing Kentucky decisions, dismisses complainant's petition as to years' taxes subsequent to the act of 1900 (and of course would have dismissed same as to all years not involved in the former decision, but for the fact that, through a sense of *judicial courtesy to Judge Evans, the decree* of the latter was permitted to stand undisturbed). (Record, page 101).

In case of the *Union & Planters Bank vs. The City of Memphis*, 111 Fed. Rep., 570, the U. S. Circuit Court of Appeals (Justice Lurton) says:

> "The case comes to this: The complainant pleads a judgment as conclusively establishing that a charter exemption exists, giving it immunity from the tax here involved, which judgment has no force or effect in the court which rendered it other than as a bar to another suit for the same identical taxes then in litigation, and which, under the law and usage of that State, is not conclusive in respect of taxes assessed for other and subsequent years.
>
> "The exemption from the *ad valorem* taxation of its capital stock claimed in this suit *exists only*, if it exists at all, by reason of the conclusive character of the thing adjudged in the prior case. But if that judgment would not be conclusive in respect of taxes for other years in the courts of the jurisdiction in which it was pronounced, upon what principle does it become of any *greater efficacy*, when relied upon as *res judicata* in the courts of another jurisdiction?
>
> . . . . . .
>
> "Nor does any principle of general law or natural justice demand that any greater efficacy shall be accorded to a judgment of any State or foreign country, when either sued upon or pleaded as *res judicata*

in the courts of another jurisdiction than is accorded to it by the law or usage of the State or country from which the judgment comes. If such judgment be given the effect and conclusiveness accorded to it at home, every demand of the positive law, as well as of justice, has been answered.

"There is nothing which precludes this court from determining for itself whether the charter exemption claimed exists, to the extent of granting the appellant immunity from the *ad valorem* taxes assessed against its capital stock by the defendant City of Memphis, except the supposed conclusive effect of the thing adjudged in the prior case, which is relied upon as settling the question, without looking into the terms of the contractural exemption.

"Finding as we do that the judgment in the prior case is not under the law of Tennessee conclusive when the second suit is a demand for taxes of other years, subsequently assessed, and that in the courts of that State neither party could plead that judgment as a bar to a suit for taxes for other years, we are, therefore, not precluded from looking into the charter."

And the bank was required to pay the taxes to the City of Memphis, the following authorities being cited:

Hilton vs. Guyot, 159 U. S., 113.
Chicago & A. R. R. Co. vs. Wiggins F. Co., 108 U. S., 118.
Chase vs. Curtis, 113 U. S., 452.
Hanly vs. Donahue, 116 U. S., 1.
Renaud vs. Abbott, 116 U. S., 227.
Embry vs. Palmer, 107 U. S., 3.
Freeman on Judgments, Section 575.
Willis *Res Judicata,* Section 531.

There was no dissent from the above opinion by any justice in the Circuit Court of Appeals for the Sixth Circuit.

This same Memphis case was decided by this Honorable Court, after a full hearing, and the judgment of

the lower courts, requiring this bank to pay its taxes to the city, was affirmed, His Honor, Chief Justice Fuller, delivering the opinion, using this language:

> "It is enough that in Tennessee the doctrine of *res judicata* is not applicable to taxes for years other than those under consideration in the particular case, inasmuch as what effect a judgment of a State court shall have as *res judicata* is a question of State or local law, and the taxes involved in this suit are taxes for years other than those involved in the prior adjudication."
>
> *Union & Planters Bank vs. City of Memphis* (decided April 13, 1903).

We need not say that the case at bar (being taxes for other years) *is precisely the same case* as the Memphis case, and we see no reason why we should continue to thresh over old straw by any further argument of this case.

We confidently rely upon Your Honors' decision in the last named case, as positively and necessarily conclusive of the case now presented by this Record.

THE JUDGMENT RELIED UPON AS RES ADJUDICATA, AND PLEADED AS AN ESTOPPEL HEREIN, IS NOT CONCLUSIVE OF THE FACTS AND LAW RAISED IN THE CASE AT BAR.

The particular matter in controversy in the adverse suit, and which resulted in the judgment, pleaded herein as *res adjudicata,* was the right of the City of Covington to assess a franchise tax against the First National Bank for the year 1893, amounting to $14,892.43. The right to collect this tax was asserted by the city, by virtue of the revenue act of 1892, which act empowered the municipality to collect a franchise tax against the bank. In said case the tax for one year, for 1893 only, was involved.

The prayer of the petition in said case was "that the defendant, its officers and agents be forever enjoined and restrained from attempting to distrain any of the plaintiff's property for said alleged tax claim of $14,892.43 or from attempting to collect same, or any part thereof, from this plaintiff, and that said claim be adjudged invalid." The tax for one year only was involved in said litigation. The right of the city to collect the franchise tax against said bank, under the act of the Legislature of Kentucky of November 11, 1892, was only involved in said litigation. There was no claim made by the bank in said case, and the court was not asked to enjoin the city from collecting any or all taxes against said bank. No such relief was asked for; no such relief was prayed for, and no such relief was granted. The Campbell Circuit Court which rendered the judgment relied upon herein as *res adjudicata*, could not, upon the facts alleged in the petition, adjudicate the right of the city to collect *ad valorem* taxes against the shares of stock of said bank, or any other tax that might in the future be assessed against said bank. The judgment of the court was "that the defendant City of Covington, its officers and agents, be and they are hereby forever enjoined and restrained from distraining, or attempting to distrain, any of the plaintiff's property for said tax claim of $14,892.43, in the petition herein set forth, and from attempting to collect same, or any part thereof, and that the plaintiff recover of the defendant the costs herein." (See page 27 of Record). In this case the court did find that the bank had a contract with the State which prohibited the defendant city from enforcing or collecting the franchise tax. The court further found "that the tax was not on the shares of capital stock, but that it was a tax on their franchise. National banks are the instrumentalities of the general government to provide National currency; to furnish the States with power to tax their franchise is to permit the States to

destroy this agency of the federal government to accomplish the purpose of that government." It will thus be seen the question asserted in said case and decided was, that the city had no power to collect a franchise tax against the defendant bank for the year 1893, because the bank had a contract with the State which prohibited the municipality from collecting such franchise tax against the bank, and that to permit the city to tax franchises of banks would be to destroy the agency of the federal government. The facts raised in said case, and the relief prayed for, as shown by the judgment relied upon herein (pages 25-6-7 of Record) are entirely different and distinct from the facts alleged and the relief prayed for in the case at bar.

The questions at issue in the case at bar are, the right of the municipality to assess the shares of stock of the National banks for taxes, under an act of the Legislature of Kentucky passed in 1900, long after the judgment relied upon herein as *res adjudicata* was rendered. The right of the city to assess and collect taxes against the shares of stock in said bank for the years 1894 to 1900 and subsequent years, is in controversy herein. The right of the city to collect this tax against the shares of stock of said bank should not be precluded by the judgment rendered in the adverse suit of January 31, 1894, because different questions, different facts, different circumstances, and different statutes are involved in the case at bar than were involved in the adverse proceeding. In the adverse suit, the right was asserted by the city to collect a franchise tax against said bank for the year 1893, under an act of the Legislature of Kentucky of 1892. In the case at bar the city is asserting the right to collect a tax against the shares of stock of the bank for the year 1894 and subsequent years, under an act of the Legislature of Kentucky of 1900. This right to collect a tax against the shares of stock of the bank under the act of 1900

was not raised, discussed or decided in the adverse suit. The judgment relied upon here as *res adjudicata* does not decide said question herein litigated; no such question was in issue in the adverse suit; no such question was raised, discussed or decided by the court in said adverse suit. This being true, the doctrine of *res adjudicata* should not apply here, and is no bar to the right of the city to proceed to collect the present tax in controversy. The doctrine is elementary and fundamental, that a plea of *res adjudicata* will not be held good or conclusive in a subsequent proceeding against the same parties, where the questions, issues, facts and circumstances are not the same in the subsequent proceedings as in the former. The judgment relied upon herein as an estoppel does not attempt to enjoin or restrain the city from assessing and collecting a tax upon the shares of stock of the bank. The judgment only enjoins the defendant city from assessing or attempting to collect a franchise tax against the capital stock of the bank. The court, in the judgment of 1894, pleaded as *res adjudicata* herein, did not and could not go so far as to enjoin the city from collecting any and all taxes that may at any time in the future be assessed against said bank under State legislation. The court could not do this in said litigation, and did not do it, because, by the act of 1900, municipalities have been given the right to assess and collect *ad valorem* taxes against the shares of stock of National banks, and this act has been held valid and binding by the highest court in the State of Kentucky, and not in violation of the alleged contract which the bank herein is asserting, by reason of the Hewitt Act, passed by the Legislature of Kentucky in 1886, the terms and provisions of which were accepted by the bank in this litigation.

This reasoning and doctrine has been sustained by this court in numerous decisions, and especially in the case of the *City of New Orleans et al. vs. Citizens Bank*

of Louisiana, reported in 167 U. S., page 371, etc., wherein this court held and decided in part as follows:

"The only question, then, remaining to be determined is, to what subjects of taxation does the estoppel of the thing adjudged apply, for it extends only to matters which are necessarily concluded by the judgment. It is clear upon the face of the record and judgment which are relied upon to constitute *res adjudicata,* that the only questions therein presented and decided were the non-liability of the bank for taxation on its capital, its banking house and furniture acquired for the purposes of its banking houses, and to a tax levied *co nomine* on its shareholders, with obligation imposed by the tax law on the bank to pay the tax. These items, however, embrace only the subjects of taxation mentioned in the first of the enumerations which we at the outset made, and did not include the objects embraced in the other three. The thing adjudged, therefore, on the face of the records and judgments does not include three of the general subjects of taxation, as the judge of the court below decreed the bank not liable for taxation. The argument, however, is that, although the objects embraced in the last three headings are not apparently within the estoppel resulting from the thing adjudged, they are nevertheless substantially so, for it is said as the thing adjudged determined that the bank under its contract can not be taxed, the principle thus established carried the other items with it. The contention is unsound, and to demonstrate that it is, we will examine briefly the three items referred to, which are embraced in the second, third and fourth headings. They are as follows:

"Second. 'That the stockholders of the bank are not liable for assessment upon their shares of stock.' *The doctrine that an exemption of the capital of a corporation does not of necessiay include the exemption of the shareholders on their shares of stock is now too well settled to be questioned."* (Our italics).

The Bank of Memphis vs. Tennessee, 161 U. S., 134; 163 U. S., 416.

"Third. 'That the bank was also not subject to taxation on any real estate held by it which had been mortgaged to secure stock subscriptions or stock loans and had become the property of the bank under foreclosure proceedings, because property so acquired became, by virtue of the purchase by the bank, a part of its capital stock.' The argument by which it is asserted that this right is embraced within the contract, and, therefore, is governed by the thing adjudged, may be thus briefly stated. The thing adjudged, it is said, establishes that the capital of the bank is non-taxable, and, where the capital can not be taxed, that in which the capital is invested becomes a part of the capital, and therefore can not be taxed, and authorities are cited which it is claimed support this proposition." This claim was also rejected by the court.

"Fourth. 'That the non-liability of the bank for taxation, embraced also immunity from the payment of a license tax to either the State of Louisiana or the City of New Orleans.' *We are at a loss to understand by what process of reasoning the decree was made to cover the question of the non-liability of the bank for license. It was not presented by the pleadings, and was entirely dehors the issue in the case."* (Our italics.)

The court in conclusion in this case held that the decree below was in part erroneous, and reversed it, holding as follows:

"The decree below is therefore reversed, and the case remanded, with the following directions: First, to enter a decree in favor of the Citizens Bank, recognizing and enforcing its non-liability to taxation, State, parochial and municipal, on its capital stock, its banking house and furniture acquired for the purposes of its banking business, and on a tax on its shareholders *co nomine,* accompanied with a legal

obligation on the bank to pay the tax. Second, rejecting the claim of the bank to non-liability of its shareholders for taxation, without prejudice to the rights of the shareholders to resist an assessment for taxation against the shares owned by them, unaccompanied with an obligation on the part of the bank to pay, in case such tax should be levied by the laws of Louisiana. Third, rejecting the claim of the bank to non-liability to taxation on the property acquired by it under foreclosure *of mortgage*—the whole without prejudice to the right of the State and municipal authorities to claim a license tax, should such be imposed by law upon the bank, and without prejudice to the right of the bank to assert any legal defenses which it may have to the payment of such license tax, and it so ordered."

It is thus in the case at bar. The decree of 1894 of the Campbell Circuit Court, as affirmed by the Court of Appeals of Kentucky in 1895, and relied upon as *res adjudicata* herein, did not cover the question of the non-liability of said bank for a tax upon the shares of stock of said bank; it was not presented by the pleading in said case; it was not male an issue in said case, and the judgment of the court relied upon does not attempt to decide said question. This being true, the question is an open one in the present case, and the right of the city to assess and collect a tax against the shares of stock of the defendant First National Bank, is not precluded by either of said judgments, and is an open question. The case at bar is analogous in many respects to the case of the *Union and Planters Bank of Memphis vs. City of Memphis* (decided April 13, 1903, by this court, and reported in 189 U. S., page 72, etc.), wherein this court refused to sustain the plea of *res adjudicata* set up by the bank. If anything, the case at bar presents a much stronger aspect in favor of the right of the city to collect the tax in controversy than in said Memphis case. In the Memphis case aforesaid the bill was filed by the State of Tennessee on behalf

of the City of Memphis, to recover of the Union and Planters Bank *ad valorem* taxes on its capital stock for the years 1887 to 1891, inclusive; or in the alternative, to recover from the stockholders of the bank the same amount as taxes on the shares of stock held by them respectively during these years. A demurrer was sustained and the bill dismissed. The Supreme Court of Tennessee, in deciding said case, rendered the following judgment on June 7, 1902, and reported in 91 Tennessee, 548:

> "The State was bound by its contract, and so likewise is the City of Memphis. This is true not only as to privilege taxes, but also with respect to other tax claims in this case. All subjects of taxation covered by the charter tax are exempt from further assessment, whether made in behalf of the State, county or municipality. As to those subjects, the specified tax is in lieu of all other taxes, State, county and municipal. Such is the undoubted meaning of the contract."

This judgment of the Supreme Court of Tennessee was pleaded as *res adjudicata* by the bank, and relied upon by it as an estoppel against the right of the City of Memphis to collect further taxes against said bank. This court, in rendering judgment in the aforesaid case, refused to sustain said plea of *res adjudicata*, and held that it only applied to the taxes actually in litigation, and was not conclusive in respect to taxes assessed for other and subsequent years, holding, further, "that inasmuch as what effect the judgment of the State court may have as *res adjudicata* is a question of State or local law, and the taxes involved in this suit are taxes for years other than those involved in the prior adjudication." Citing *Phoenix Fire Insurance Co. vs. Tennessee,* 161 U. S., 174.

In the case at bar, the judgment relied upon as *res adjudicata* to defeat the taxes in controversy, enjoined the city from collecting only a franchise tax against the

capital stock of the bank for the year 1893. This is the only tax that was in controversy in said suit, and the only question decided by the judgment in said case. The judgment does not prohibit the right of the city to collect a tax against the shares of stock of said bank, as was raised in the Memphis case and as adjudged in said case. This case, then, presents itself to the court in a much stronger aspect than the Memphis case, and is only suggested herein as a stronger reason why the judgment relied upon herein is not and should not be held to be conclusive of the right of the city to assess and collect taxes against the shares of stock of the bank herein.

I believe this court will hold as it did in the Memphis case, "that inasmuch as what effect the judgment of the State court will have as *res adjudicata*, is a question of State or local law," and that the taxes involved in this suit are taxes for years other than those involved in the prior adjudication, and as the Court of Appeals of Kentucky has frequently held and decided, that the plea of *res adjudicata* is only applicable to the taxes actually in litigation; that, therefore, the Memphis case is controlling and decisive of the case at bar.

Deposit Bank vs. Board of Councilmen of Frankfort (decided December 14, 1903).

The decision of this Honorable Court in the abovementioned cause is not inconsistent with the decision in *Union and Planters Bank vs. Memphis* (decided April 13, 1903), and has *no application to the case at bar*, because the effect of the judgment considered in said Deposit Bank case was *a judgment of the United States Circuit Court for the District of Kentucky*, whereas the judgment now pleaded as an estoppel in this case is *a judgment of the Campbell County Circuit Court of the State of Kentucky* (Record, page 27).

In the Deposit Bank of Frankfort case, the *dis-*

tinction between the effect of a Federal court judgment and a State court judgment (when considered by this court) is *so clearly and strongly drawn and pointed out,* that we need only to call Your Honors' attention to the same, without attempting to elaborate the reasons for the distinction in this brief. We quote from the language of the opinion of the court (delivered by Justice Day) in said Deposit Bank case:

> "In this case we have to deal with the effect of a decree of the Circuit Court of the United States which is unreversed and affirmed in this court, and in which, between the parties to the present action, it was held that the Hewitt Law was a valid enactment and constituted a contract between the parties within the protection of the contract clause of the Constitution of the United States. * * *
>
> "It is urged that the State judgment upon which the Federal decree of 1898 is based, was afterwards reversed by the highest court of Kentucky, and, therefore, the foundation of the decree has been removed, and the decree itself must fall. But is this argument sound? When a plea of *res judicata* is interposed, based upon a former judgment between the parties, the question is not what were *the reasons* upon which the judgment proceeded, but what was the judgment itself? Was it within the jurisdiction of the court, between the same parties, and is it still in force and effect? * * *
>
> "In every other forum the reasons for passing the decree are wholly immaterial, and the subsequent reversal of the judgment upon which it is predicated can have no other effect than to authorize the party aggrieved to move in some proper proceeding, *in the court of its rendition,* to modify it or set it aside." * * *

So it will be seen that the sharp issue in the Deposit Bank of Frankfort case, in the argument between the majority of this Honorable Court (speaking through Justice Day) and the minority (speaking through Chief-Jus-

tice Fuller) was not whether this court will give the same effect to a judgment of a State court as is given same by the laws and usage of that State (this was not disputed and not discussed); but the question was (when a judgment of a Federal court is based entirely on a judgment of the State court, which has afterwards been reversed), whether this court should still rigorously adhere to the Federal court judgment, treating the State court judgment as *merely the reason* for the Federal court judgment, and, therefore, ignored? (Some of the counsel in the present case represented the city of Frankfort in Deposit Bank case, and then urged the same views so ably presented by the minority opinion (Justice Fuller), yet we are compelled to recognize the force of the distinction made between the effect of a Federal and a State court judgment.)

Referring to the Union Planters Bank case, *supra*, His Honor, Justice Day (in deciding the Deposit Bank case), uses this language:

> "It was held that the Federal courts were not required to give such domestic judgments any greater force and effect than was awarded them by the courts of the State where rendered.
>
> "But it is equally well settled that a right claimed under the Federal Constitution, finally adjudicated in the *Federal courts*, can never be taken away or impaired by State decisions. The same reasoning which permits to the States the right of final adjudication upon purely State questions requires no less respect for the final decisions of the Federal courts of questions of National authority and jurisdiction."

With great confidence we earnestly ask this Honorable Court to reverse the judgment and permit the City of Covington to enforce the act of March 21, 1900, by collection of so much of the taxes due from the First

National Bank of Covington as is not already barred by limitation.

Respectfully,

F. J. HANLON,
J. H. HAZELRIG,
IRA JULIAN,
Counsel for City of Covington, Ky.

POINTS AND AUTHORITIES.

I.

The act of March 21, 1900, providing for taxation of shares of National banks is not repugnant to Section 5219, Revised Statutes U. S., because of its retroactive provision.

Kentucky Statutes, Chapter 108.
Owensboro Nat. Bank vs. City of Owensboro, 173 U. S.
Act March 21, 1900.
Board of Councilmen vs. Mason & Foard Co., 100 Ky. R., 48.
Blackwell on Tax Titles (5th Ed.), Sections 324-327.
Kentucky Statutes, Sections 3176-3375, 4020, 4022, 4090, 4241.
Constitution of Kentucky, Sections 170, 171, 172, 174.
Scobee, Sheriff, vs. Bean, 22 Ky. L. R., 1076.
City of Chester vs. Black, (Pa.), 6 L. R. A., 802.
Butler vs. City of Toledo, 5 Ohio State, 225.
Mills vs. Charleston, 29 Wis., 400.
Marion Co. vs. L. & N. R. R. Co., 91 Ky. R., 388.
In Re Van Antwerp, 56 N. Y., 261.
L. & N. R. R. Co. vs. Com., 1 Bush. Ky. R., 250.
Long vs. Kiende, 27 Hun., 66.
Mattingly vs. Dist. Columbia, 97 U. S., 687.
Plummer vs. Marathon Co., 46 Wis., 104.
Florida Cen. & Pen. R. R. vs. Reynolds, 183 U. S., 471.
Cooley on Taxation, 309.
Mercantile Nat. Bank vs New York, 121 U. S., 138.
Lou. & Jeff. Ferry Co. vs. Com., 22 Ky. L. R., 446.
Com. vs. Citizens Nat. Bank of Danville, and *Citizens Nat. Bk. of Lebanon vs. Com.* (decided April 27, 1904, and to be reported in Vol. 25, Ky. L. R., 2254).
Town of London vs. Hope, 26 Ky. L. Rep., 112.
Cooley on Taxation, 2d Ed., 291.

II.

The act in controversy is not unconstitutional by reason of any conflict whatever with Section 5219 U. S. Statutes.

Adams vs. Nashville, 95 U. S., 22.
Bank vs. Com., 9 Wallace, 362.
Davenport Nat. Bank vs. Davenport, &c., 123 U. S., 83.
Van Slyke vs. Wisconsin, 154 U. S., 581.
First Nat. Bank vs. Ayres, 160 U. S., 660.
Aberdeen Bank vs. Chihalis Co., 166 U. S., 440.
Merchants Bank vs. Penn., 167 U. S., 461.
Mercantile Nat. Bank vs. New York, 121 U. S., 138.
Lander vs. Mercantile Bank, 186 U. S., 458.
Scobee, Sheriff, vs. Bean, 22 R., 1079.
Commonwealth of Ky. vs. Citizens Nat'l Bank of Danville; Citizens National Bank of Lebanon vs. Com. (decided April 27, 1904, and to be reported in Vol. 25, Ky. L. R., 2254).
Hammond vs. Com. of Massachusetts, &c., and *Churchill vs. City of Utica* (bank tax cases), (decided March 25, 1866 Vol. 70, U. S.).
People vs. Com'rs (decided January 7, 1867), (Vol. 71, U. S.).

III.

THE ALLEGED CONTRACT OF EXEMPTION.

The estoppel proposed by the bank should not prevail in this court because the same would not prevail in the courts of Kentucky.

Section 905, U. S. Statutes.
Mills vs. Duryee, 7 Cranch, 484.
Hampton vs. McConnell, 3 Wheaton, 234.
McElmoyle vs. Cohen, 13 Peters, 326.
Christmas vs. Russell, 5 Wallace, 290.
Thompson vs. Whitman, 18 Wallace, 457.
Phoenix Ins. Co. vs. Tenn., 161 U. S., 184.

Abrahams vs. Casey, 179 U. S., 218.
City of Newport vs. Com. of Ky., 21 Ky. L. R., 47.
Metcalf vs. Watertown, 153 U. S., 671.
Lou. Bridge Co. vs. City of Lou., 22 Ky. L. R., 703.
Negley, Sheriff, vs. City of Henderson, 59 S. W. R., 19.
Bell Co. Coke Co. vs. City of Pineville, 23 Ky. L. R., 933.
Cooper vs. Newell, 173 U. S., 555.
Union Planters Bank vs. Memphis, 111 Fed. R., 570.
Same vs. Same, in U. S. S. Ct., decided April 13, 1903.
Hilton vs. Guyot, 159 U. S., 113.
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